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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON TOXICS COALITION,)	
NORTHWEST COALITION FOR)	Civ. No. C01-0132C
ALTERNATIVES TO PESTICIDES,)	
PACIFIC COAST FEDERATION OF)	
FISHERMEN'S ASSOCIATIONS, and)	PLAINTIFFS' COMBINED OPPOSITION
INSTITUTE FOR FISHERIES RESOURCES,)	TO CROPLIFE'S MOTION FOR A STAY
)	PENDING APPEAL AND WASHINGTON
Plaintiffs,)	STATE FARM BUREAU AND
)	WASHINGTON STATE POTATO
v.)	COMMISSION'S MOTION TO STAY AND
)	MODIFY THE JANUARY 22, 2004 ORDER
ENVIRONMENTAL PROTECTION)	AWARDING INJUNCTIVE RELIEF
AGENCY, and CHRISTINE TODD)	PENDING APPEAL
WHITMAN, ADMINISTRATOR,)	
)	NOTED ON MOTION CALENDAR:
Defendants,)	APRIL 2, 2004 and APRIL 9, 2004
)	
AMERICAN CROP PROTECTION)	
ASSOCIATION, et al.,)	
)	
Intervenor-Defendants.)	

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1 INTRODUCTION

2 Plaintiffs Washington Toxics Coalition et al. (the “Coalition”) are submitting this
3 combined response to the overlapping motions for a stay pending appeal (Docket Nos. 241 and
4 252) filed by defendant-intervenors CropLife America et al. (“CropLife”) and defendant-
5 intervenors Washington State Farm Bureau and the Washington State Potato Commission
6 (“Farm Bureau”), who participated as part of the CropLife coalition up to this stage in the
7 litigation but have now retained separate legal counsel. Due to the voluminous motions,
8 spanning 75 pages, and the two dozen supporting declarations plus exhibits, the Coalition asked
9 this Court for an extension of time until April 30, 2004 to respond, which this Court granted. On
10 April 5, 2004, CropLife filed an emergency motion for a stay in the Ninth Circuit Court of
11 Appeals, contending that the extension of time made it impracticable for CropLife to seek the
12 stay in this Court. In response, the Coalition filed its opposition in the court of appeals on April
13 19, 2004. The Coalition is now filing its opposition in this Court prior to the April 30, 2004
14 deadline to facilitate this motion’s expeditious resolution.¹

15 CropLife’s motion for a stay pending appeal suffers from two fatal flaws. First, it never
16 acknowledges the evidence of harm to threatened and endangered salmon and steelhead that
17 formed the basis of this Court’s orders. Second, CropLife struggles to convert this case into
18 something other than a citizen suit enforcing the Endangered Species Act (“ESA”) in order to
19

20 ¹ On March 29, 2004, the Coalition served requests for production of documents on both sets of
21 intervenors. Once the Coalition receives the discovery responses, it may file a supplemental
22 submittal providing any pertinent information to the Court.

23 The Farm Bureau served only every other page of its motion by mail, which the Coalition
24 received on March 22, 2004. The Coalition asked intervenors to correct their certificate of
25 service (Docket No. 263) to reflect the date and partial service, which intervenors have not done.
26 The Coalition obtained the complete motion from the electronic docket on March 23, 2004.

1 bypass the ESA's precautionary standards. CropLife reasserts losing arguments that it has
2 embraced throughout this litigation to attempt to contort this lawsuit into an Administrative
3 Procedure Act ("APA") challenge governed by the more lax injunction and cost-benefit
4 standards in the APA and Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). When
5 this contortionist act is exposed and rejected, CropLife is left with resisting the ESA's clear
6 applicability to ongoing agency actions and its standard governing injunctive relief, which bars
7 the type of balancing of economic harm CropLife urges. Under the appropriate legal standard
8 and based on the extensive evidence of harm to salmon from the pesticides uses at issue, the
9 Court acted well within its equitable authority in issuing the January 22, 2004 injunction.

10 The Farm Bureau's motion for a stay suffers from the same flaws. Like CropLife, the
11 Farm Bureau has offered extensive evidence asserting that the Court's January 22, 2004 Order
12 will have various economic impacts, but such evidence is irrelevant under ESA Section 7 and
13 must be stricken. The Farm Bureau also asks this Court to find fault with EPA's effects
14 determinations and risk assessment findings based on the critique of a newly-offered expert.
15 This attempt to litigate complex scientific issues is both too late and contrary to ESA Section 7,
16 which charges EPA in the first instance and ultimately the National Marine Fisheries Service
17 ("NMFS") as the expert salmonid agency with compiling the best science and assessing the
18 effects of the pesticides on listed salmon. In keeping with the ESA, this Court, in its July 16,
19 2003 Order, appropriately rejected the invitation to hold a full-blown evidentiary hearing since it
20 is the consultation process, not a court, that is assigned the task of conducting such a fact-
21 intensive inquiry to develop long-term measures to prevent jeopardy. July 16, 2003 Order at 3-4.

1 BACKGROUND

2 I. THE COURT'S JULY 2002 SUMMARY JUDGMENT RULING AND JANUARY
3 2004 INJUNCTION ARE BASED ON EVIDENCE OF HARM TO SALMON AND
4 STEELHEAD FROM THE PESTICIDES AT ISSUE.

5 NMFS began listing salmon in 1989 with the emergency listing of the Sacramento winter
6 run chinook and has since adopted 25 other Pacific salmon and steelhead listings. Despite the
7 passage of more than a dozen years since the first salmon ESA listing, EPA had never initiated
8 consultation with NMFS on a single pesticide when the Coalition filed this case in January 2001.

9 A growing body of scientific evidence documents numerous ways pesticides impact
10 salmon. These impacts include mortalities, sublethal effects to salmon, and indirect effects on
11 salmon food sources and habitat. Decl. of Richard Ewing, Ph.D, ¶¶ 4-19 (Apr. 2001) (Docket
12 No. 16). With its summary judgment motion, the Coalition introduced evidence that 54 specific
13 pesticides are causing or are likely to cause harm to listed salmonids. This evidence was
14 presented in two forms: (1) U.S. Geological Survey detections of the pesticides in salmon
15 watersheds at levels that scientific and governmental bodies have associated with adverse effects
16 to salmon or their habitat; and (2) EPA findings in its ecological risk assessments that the
17 registered uses of these pesticides would likely result in environmental contaminations that
18 exceed EPA's levels of concern for fish and their habitat. Ewing Decl. ¶¶ 24-26 & Ex. 4-8
19 (Docket No. 16); Ex. 46-47 to 1st Decl. of Aimee Code, M.S., ¶¶ 6-17 (Apr. 2001) (Docket Nos.
20 17 and 19); 3rd Decl. of Aimee Code, M.S. ¶ 2 (Nov. 2002) & Ex. 1, 22 (Docket Nos. 99 and
21 101).

22 On July 2, 2002, this Court issued an order directing EPA to begin the process of
23 ensuring that use of the 55 pesticides will not harm listed salmon.² The Court found that "it is

24 ² While the Court's order listed lindane by two different names, EPA has divided triclopyr into
25 two formulations and is making separate effects determinations on each. The total number of

undisputed that EPA has not initiated, let alone completed, consultation with respect to the relevant 55 pesticide active ingredients,” Order at 16, and that “EPA’s own reports document the potentially-significant risks posed by registered pesticides to threatened and endangered salmonids and their habitat.” Id. at 15 n.25. According to the Court:

Despite competent scientific evidence addressing the effects of pesticides on salmonids and their habitat, EPA has failed to initiate section 7(a)(2) consultation with respect to its pesticide registrations. . . . Such consultation is mandatory and not subject to unbridled agency discretion. The Court declares, as a matter of law, that EPA has violated section 7(a)(2) of the ESA with respect to its ongoing approval of 55 pesticide active ingredients and registration of pesticides containing those active ingredients.

Id. at 15. The Court established a schedule for EPA to initiate consultations on the pesticides, which runs from July 15, 2002 through December 1, 2004.

II. THE DISTRICT COURT PROCEEDINGS LEADING UP TO ISSUANCE OF THE INJUNCTION AFFORDED EPA, CROPLIFE, AND THE FARM BUREAU EXTENSIVE OPPORTUNITIES TO OFFER EVIDENCE AND BE HEARD.

Because initiation of consultation merely begins what has been a lengthy process to bring pesticide registrations into compliance with the ESA, the Coalition filed a motion in November 2002 seeking further injunctive relief to protect salmon from these pesticides during the consultation process. The Court extended the time for opposing this motion to give EPA and CropLife a chance to depose the Coalition’s experts and to compile their own expert reports and counter-evidence. Nearly four months after the filing of the motion, EPA and CropLife submitted oppositions, each accompanied by four declarations and numerous exhibits.

On July 16, 2003, this Court issued an order indicating that plaintiffs have demonstrated: that the relevant agency actions . . . present a significant, potential harm to threatened and endangered salmonids.

effects determinations, therefore, remains at 55.

1 with reasonable scientific certainty, that the requested buffer zones . . . will,
2 unlike the status quo, substantially contribute to the prevention of jeopardy.

3 [that the evidence submitted by all parties] demonstrate[s] that pesticide-
4 application buffer zones are a common, simple, and effective strategy to avoid
jeopardy to threatened and endangered salmonids.

5 July 16, 2003 Order at 3. The Court scheduled a hearing for August 14, 2003, to afford EPA and
6 CropLife a further opportunity to present argument regarding the specific size of buffer zones for
7 particular salmonids and pesticides and additional urban-use restrictions.

8 On August 8, 2003, the Court issued an order further detailing its reasoning for deciding
9 to issue an injunction imposing the requested buffer zones. First, “[g]iven EPA’s substantial
10 procedural violation of section 7(a)(2), interim injunctive relief is generally necessary to fulfill
11 the institutionalized caution mandate of the ESA.” Order at 11. Second, neither EPA nor
12 CropLife had shown the pesticides’ uses to be non-jeopardizing to listed salmonids. Id. To the
13 contrary, the Court found that “significant, potentially harmful activity is presently ongoing in
14 the face of a substantial unremedied procedural violation of the ESA,” id. at 16. In addition:

15 An EPA expert described how one pesticide is highly toxic to fish and has
16 potential for negative effects on 23 of the 26 listed salmonids due to its
widespread use and migration into salmon-bearing waters. Id. at 12.

17 Another EPA expert described the myriad factors surrounding each pesticide use
18 that must be taken into account in tailoring mitigation measures to avoid pesticide
exposure to listed salmonids. Id. at 12.

19 EPA’s effects determinations rely on and recommend buffer zones to mitigate the
impacts of the pesticide uses on salmon and steelhead. Id. at 12-13.

20 CropLife’s arguments that specific pesticide uses would not harm salmonids are
21 belied by EPA’s risk assessments and NMFS and FWS critiques of those risk
assessments. Id. at 13-14.

22 Current buffer zones were set without particular reference to salmon impacts and
23 ESA standards. Id. at 14-15.

1 NMFS and FWS believe EPA's myopic focus on lethality provides an
2 "inadequate level of protections" under ESA Section 7(a)(2) because "[m]ost
3 direct effects . . . on listed salmon and steelhead are likely to be from sublethal
4 effects" and "[t]he lethality endpoint has little predictive value for assessing
5 whether real world pesticide exposure will cause sublethal neurological and
6 behavioral disorders in wild salmon." Id. at 14-16.

7 With respect to the buffer zones, the Court found:

8 The evidence submitted – including the declarations of *all* parties' experts,
9 reregistration eligibility decisions, EPA risk assessments, prior EPA consultations
10 with the Fish and Wildlife Service, EPA's reliance on California's county bulletin
11 buffer zones, and an EPA expert's current section 7(a)(2) recommendations –
12 demonstrates that pesticide-application buffer zones are a common, simple, and
13 effective strategy to avoid jeopardy to threatened and endangered salmonids.
14 Plaintiffs' experts sufficiently articulate the general efficacy of buffer zones in
15 preventing the mitigation of pesticides, via spray drift, surface runoff, or erosion,
16 into salmon-bearing waters. Neither EPA nor CropLife dispute these basic
17 principles.

18 Id. at 16. More specifically, EPA's effects determinations "hinge on the employment of buffer
19 zones, such as those outlined by California county bulletins, to prevent jeopardy to threatened
20 and endangered salmonids." Id. at 17. Moreover, "[i]n every instance that the [1989 FWS
21 biological] opinion found jeopardy to an aquatic species from a pesticide at issue in this case,
22 such as diazinon and diflubenzuron, the opinion employed buffer zones as a reasonable and
23 prudent alternative to avoid jeopardy." Id. at 17.

24 The Court provided further direction for the August 14, 2003 hearing. Specifically, in
25 crafting buffer zones for particular pesticide uses and salmon listings, the Court indicated that it
26 would give great weight to the exercise of agency expertise in the ESA Section 7 process. Id. at
13 n.20. More specifically, if an EPA expert has recommended or relied on a particular buffer
zone in EPA's effects determination, the Court would likely adopt that buffer zone as appropriate
interim relief. Id. at 20.

During the week preceding the August hearing, CropLife submitted additional briefing

1 and five new declarations, purporting to refute the need for buffers, highlighting the alleged
2 economic impact of such buffer zones or urban restrictions, and proposing smaller and often no
3 buffers for particular pesticide uses based on the registrants' desires, as expressed to CropLife.
4 In addition, four registrants submitted *amicus* briefs, submitting similar contentions and
5 evidence. See Syngenta Crop Protection Prehearing Brief (Docket No. 177); Central Garden and
6 Pet Company's *Amicus* Brief (Docket No. 168); Dow Agrosiences *Amicus* Brief; Makhteshim-
7 Agan *Amicus* Brief (Docket Nos. 164 and 166).³

8 At the close of the August 14, 2003 hearing, the Court directed the parties to consult and
9 cooperate in drafting an injunction order incorporating the Court's orders and direction provided
10 at the hearing. Transcript at 53-55. In early October 2003, the parties submitted proposed
11 interim relief orders. CropLife proposed 49 smaller buffer schemes, often consisting of no buffer
12 at all or only minimal buffers. These proposals were based on the registrants' wish list
13 reproduced in a 119-page spread sheet relaying the registrants' rationale, which generally relied
14 on the current label, an EPA re-registration eligibility decision, or unsubstantiated (and hearsay)
15 argument provided through CropLife's counsel from the registrant. 2nd Declaration of Seema
16 Mahini (Oct. 2, 2003).

17 The Court held another hearing on December 9, 2003, to provide further guidance on the
18 language of the injunction. Pursuant to the Court's direction, the Coalition submitted a proposed
19 order embodying this direction, and EPA and CropLife filed their respective objections.

20 On January 22, 2004, the Court issued its order imposing as further injunctive relief
21 buffer zones for 38 pesticides along salmon supporting waters and urban point of sale warnings
22

23 ³ On the day of the hearing, EPA also filed two preliminary papers assessing the purported
24 economic impact of the injunctive relief requested by plaintiffs. Docket No. 185.

1 for seven pesticides found frequently by USGS in urban salmon streams. The Court excluded:
2 (1) pesticide uses for which EPA has made “no effect” or “not likely to adversely affect”
3 determinations; (2) public health vector control programs administered by public entities; (3)
4 noxious weed programs implementing safeguards routinely required by NMFS; (4) programs
5 authorized by NMFS under the ESA; (5) 11 specific pesticide uses or specific-application
6 methods for which the Court established alternative buffer zones; and (6) 14 specific products or
7 uses.

8 ARGUMENT

9 CropLife and the Farm Bureau urge this Court to abandon the ESA standards that govern
10 injunctive relief for an ESA Section 7(a)(2) violation. The motions largely repackage arguments
11 made previously in this case, which have no more merit now than they did when initially made.
12 This Court acted well within its equitable authority in issuing an injunction to minimize the
13 demonstrated harm to threatened and endangered salmon during the time it takes EPA to remedy
14 its substantial procedural violation of Section 7(a)(2).

15 The current motions are accompanied by two dozen declarations. Some of the
16 declarations purport to present expert opinions, long past the deadline for expert witness
17 disclosures and discovery. Accordingly, they should be stricken. Others make factual assertions
18 without an adequate foundation. In fact, many of the assertions of harm ignore exemptions
19 written into the injunction and, therefore, lack credibility and should be disregarded.

20 I. THE INJUNCTION COMPORTS WITH THE ESA AND THE EVIDENCE.

21 A. The ESA’s Balance in Favor of Species Cannot Be Overridden by Economic 22 Harm.

23 This Court must decline CropLife’s request to stay the injunction because of its alleged
24 economic harm. As the Supreme Court held in Tennessee Valley Authority v. Hill, 437 U.S.

1 153, 184 (1978): “The plain intent of Congress in enacting this statute was to halt and reverse the
2 trend toward extinction, whatever the cost.” In upholding an injunction preventing the
3 completion of the Tellico Dam, the Court explained, *id.* at 187-88:

4 On the contrary, the plain language of the Act, buttressed by its legislative history,
5 shows clearly that Congress viewed the value of endangered species as
6 “incalculable.” Quite obviously, it would be difficult for a court to balance the
7 loss of a sum certain – even \$100 million – against a congressionally declared
8 “incalculable” value, even assuming we had the power to engage in such a
9 weighing process, which we emphatically do not.

10 CropLife cites repeatedly to non-ESA cases in asking this Court to strike a different
11 balance based on monetary impacts, but these cases recognize that a separate line of precedent
12 governs injunctive relief under the ESA. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313-14
13 (1982), reconfirmed that the ESA “foreclosed the exercise of the usual discretion possessed by a
14 court of equity,” explaining that: “Congress, it appeared to us, had chosen the snail darter over
15 the dam. The purpose and language of the statute limited the remedies available to the District
16 Court; only an injunction could vindicate the objectives of the Act.” See also Amoco Prod. Co.
17 v. Village of Gambell, 480 U.S. 531, 543 n.9 (1987) (same).

18 Heeding TVA v. Hill, the Ninth Circuit has held that Congress has constrained judicial
19 balancing in crafting injunctive relief in ESA cases. In Sierra Club v. Marsh, 816 F.2d 1376,
20 1382-83 (9th Cir. 1987), the Ninth Circuit held that the district court erred in applying the
21 traditional balancing test for a preliminary injunction under the ESA, stating that the ESA “does
22 not permit courts to consider the hardship an injunction may impose on the project,” and dictates
23 that any risk “must be borne by the project, not by the endangered species.” 816 F.2d at 1386-
24 87. A court is prohibited from “us[ing] equity’s scales to strike a different balance.” *Id.* at 1383;
25 *id.* (the typical injunction standard is “not the test for injunctions under the Endangered Species
26 Act”). Accordingly, a court is prohibited from “us[ing] equity’s scales to strike a different

balance.” Id. See also Biodiversity Legal Found. v. Badgley, 284 F.3d 1046, 1057 (9th Cir. 2002) (“Congress in passing the ESA removed the traditional discretion of courts in balancing the equities before awarding injunctive relief”); Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996) (“Congress has determined that under the ESA the balance of hardships always tips sharply in favor of endangered or threatened species”); National Wildlife Fed. v. Burlington Northern R.R., 23 F.3d 1508, 1511 (9th Cir. 1994) (“‘language, history, and structure’ of the ESA demonstrate[] Congress’ determination that the balance of hardships and the public interest tips heavily in favor of protected species”); Greenpeace v. NMFS, 106 F. Supp.2d 1066, 1072 (W.D. Wash. 2000) (“Under the ESA, the balance of hardships has already been struck in favor of endangered species”).

B. The ESA’s § 7 Injunction Standard Controls.

Not only did TVA v. Hill foreclose the traditional balancing of the equities, but it insisted on strict adherence to the ESA’s Section 7 mandates. As explained by the Supreme Court:

Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as “institutionalized caution.”

Id. at 194.⁴

Because Section 7 embodies this “institutionalized caution,” the courts have insisted on strict compliance with Section 7’s process as the means of ensuring that agencies will not jeopardize the survival of endangered species. In Sierra Club v. Marsh, 816 F.2d at 1384, the Ninth Circuit stressed: “The substantive and procedural provisions of the ESA are the means

⁴ The Supreme Court observed that the ESA indicates “beyond doubt” the legislature’s intent to give precedence to species that face extinction. Id. at 174. While CropLife contends (at 11 n.13) that a subsequent amendment lowered the standard for Section 7 compliance, no case has embraced this argument. To the contrary, the Ninth Circuit cases discussed above embodying the Section 7 standard postdate the statutory amendment.

1 determined by Congress to assure adequate protection. Only by requiring substantial compliance
2 with the act's procedures can we effectuate the intent of the legislature." Similarly, in Thomas v.
3 Peterson, 753 F.2d 754, 764 (9th Cir. 1985), the Ninth Circuit explained: "If a project is allowed
4 to proceed without substantial compliance with those procedural requirements, there can be no
5 assurance that a violation of the ESA's substantive provisions will not result. The latter, of
6 course, is impermissible." This Court found that irreparable harm flowed from the substantial
7 procedural Section 7 violations and appropriately refused to turn the injunction proceeding into a
8 judicial predetermination of the outcome of Section 7 consultations. Aug. 8, 2003 Order at 6-7,
9 19-20.⁵

10 The Farm Bureau (at 33) departs from this precedent insisting that this Court must make
11 a jeopardy finding as a predicate for issuing injunctive relief. In its view, the Coalition has the
12 burden of proving jeopardy and the Court must find jeopardy will occur. Id. at 33-34. This
13 approach would turn Section 7 and ESA injunction jurisprudence on its head. It would allow
14 agencies to spurn their Section 7 obligations, leaving endangered species at risk for inordinate
15 periods of time, and erect hurdles to effective judicial remedies. Indeed, the Farm Bureau asserts
16 that "'jeopardy' is a legal term of art which cannot occur until NMFS or the Court deems it to
17 occur, usually upon issuance of a Biological Opinion." Id. at 33. In other words, the Farm
18 Bureau believes no injunction can issue in the absence of a jeopardy biological opinion or the
19 equivalent developed by a court. As the Ninth Circuit explained in Thomas v. Peterson, 753
20

21 ⁵ CropLife continues to rely on Southwest Center for Biological Diversity v. Forest Service, 307
22 F.3d 964 (9th Cir. 2002), even though that case has recently been withdrawn as moot. 355 F.3d
23 1203 (9th Cir. 2004). This Court properly distinguished Southwest Center because, unlike this
24 case, it did not involve a substantial procedural violation of § 7(a)(2), and record evidence
showed protective measures had mitigated the harm to listed species. Aug. 2003 Order at 7-9.
This Court (at 6) also distinguished Nat'l Wildlife Fed. v. Burlington N.R.R., 23 F.3d 1508 (9th
Cir. 1994), because it did not involve § 7(a)(2) obligations, but ESA § 9.

1 F.2d at 765:

2 This is not a finding appropriate to the district court at the present time. Congress
3 assigned to the agencies and to the Fish & Wildlife Service the responsibility for
4 evaluation of the impact of agency actions on endangered species, and has
5 prescribed procedures for such evaluation. Only by following the procedures can
proper evaluations be made. It is not the responsibility of the plaintiffs to prove,
nor the function of the courts to judge, the effect of a proposed action on an
endangered species when proper procedures have not been followed.

6 C. The ESA Injunction Standard Applies to Ongoing Agency Actions.

7 Contrary to CropLife's plea for different treatment of ongoing actions, nothing on the
8 face of the ESA or in the case law carves out an ongoing action exception. In searching for such
9 an exception, CropLife cites precedent (at 10 & n.12; 18 n.22) excluding actions from Section 7
10 where the agency had no ongoing discretion or control. In its July 2002 Order at 9, this Court
11 distinguished this precedent:

12 Because EPA retains ongoing discretionary authority to modify the terms and
13 conditions of these 'licenses', the Court concludes that each pesticide registration
constitutes an ongoing agency action for purposes of section 7(a)(2).

14 In making this argument, CropLife ignores TVA's acknowledgement that Section 7
15 extends to ongoing actions, 437 U.S. at 186, and the many instances in which the courts have
16 upheld Section 7 injunctions reaching ongoing actions. The Ninth Circuit held that Section
17 7(a)(2) injunctions can reach ongoing actions in Pacific Rivers Council v. Thomas, 30 F.3d 1050,
18 1156-57 (9th Cir. 1994). After holding that forest plans are agency actions subject to Section 7
19 consultation, the Ninth Circuit held that the Forest Service could not go forward with any
20 project, including ongoing projects, that "may affect" salmon before it completed Section 7
21 consultation. Id. In a companion case, the district court enjoined the Forest Service from
22 allowing cows to graze under a previously granted grazing allotment pending completion of
23
24

consultation. Pacific Rivers Council v. Thomas, 936 F. Supp. 738, 745 (D. Idaho 1996).⁶

Adhering to well-settled ESA case law, numerous cases have enjoined ongoing agency actions that have not completed Section 7 consultation. For example, in Natural Resources Defense Council v. Houston, 146 F.3d 1118 (9th Cir. 1998), the Ninth Circuit upheld the district court's rescission of water service contracts renewed by the Bureau of Reclamation without complying with Section 7. In Greenpeace v. NMFS, 106 F. Supp.2d 1066, 1076 (W.D. Wash. 2000), this Court enjoined fishing in Steller sea lion critical habitat because the agency "cannot validly authorize continued fishing within Steller sea lion critical habitat until it meets its substantive obligations under the ESA. Under Thomas, an injunction pending compliance must be the remedy." In Pacific Coast Fed. of Fishermen's Ass'ns v. Bureau of Reclamation, 138 F.Supp.2d 1228, 1250 (N.D. Cal. 2001), a district court enjoined the Bureau of Reclamation from delivering water from a federal irrigation project when river levels fell below certain minimum flows for salmon until completion of consultation. And in Greenpeace Foundation v. Mineta, 122 F.Supp.2d 1123, 137 (D. Hawaii 2000), the district court enjoined lobster fishing in the Western Pacific Ocean because "Section 7 compels the Court to enjoin operation of the lobster fishery until NMFS completes formal consultation . . ."⁷

⁶ This case is also a far cry from those in which the action agency lacked the authority to modify its actions to avoid jeopardizing threatened and endangered species. See American Forest & Paper Ass'n v. EPA, 137 F.3d 291, 297-99 (5th Cir. 1998) (EPA lacked the authority under the Clean Water Act to veto state-issued permits that adversely impact listed species); Platte River Whooping Crane Trust v. FERC, 962 F.2d 27, 32-33 (D.C. Cir. 1992) (FERC lacked authority under the Federal Power Act to alter existing licenses without the licensee's consent). Here, EPA has the authority to cancel or modify pesticide registrations to avoid unreasonable adverse environmental effects, which encompass jeopardy to listed species. See Riverside Irrigation Dist. v. Andrews, 758 F.2d 508, 511-13 (10th Cir. 1985) (Army Corps of Engineers had the authority to consider water quality effects on endangered species in denying nationwide permits).

⁷ CropLife (at 5-7) seeks to recast the Coalition's claim as challenging EPA's failure to make effects determinations. Both in the complaint and its motion for summary judgment, however, the Coalition challenged EPA's failure to consult on the pesticides at issue. This Court held that

1 D. The Court Has Equitable Authority to Issue Injunctions to Protect Species During
2 Consultation.

3 CropLife ignores the caselaw enjoining agencies from proceeding with both new and
4 ongoing actions pending completion of Section 7 consultation and asserts (at 7-8) that this Court
5 could do no more than order EPA to initiate consultation to redress EPA's longstanding Section
6 7 violations. None of the cited cases supports this assertion. To the contrary, it has long been
7 established that the courts have broad equitable power to craft appropriate injunctions to remedy
8 violations of the law. See Hecht v. Bowles, 321 U.S. 321, 329 (1944) ("The essence of equity
9 jurisdiction has been the power . . . to do equity and to mould each decree to the necessities of
10 the particular case. Flexibility rather than rigidity has distinguished it."); Camp v. Boyd, 229
11 U.S. 530, 551-52 (1913) (a court may "give whatever other relief may be necessary under the
12 circumstances. Only in that way can equity do complete rather than truncated justice."). Where
13 Congress creates a right of action, courts have "the availability of all appropriate remedies unless
14 Congress has expressly indicated otherwise." Franklin v. Gwinnett County Public Schools, 503
15 U.S. 60, 66 (1992). As the Supreme Court explained in Weinberger v. Romero-Barcelo, 456
16 U.S. at 313, a case embraced selectively by CropLife: "Unless a statute in so many words, or by
17 necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of

18 EPA had violated Section 7(a)(2), not the regulations, and directed EPA to make determinations
19 and consult, as appropriate, for the 55 pesticides. July 2002 Order at 17-18, 20. Whether the
20 ESA consultation regulations are binding on EPA and whether they compel EPA to make effects
21 determinations is of no moment. But see Center for Biological Diversity, Slip op. at 3 n.2 ("The
22 regulations themselves, however, clearly purport to bind other agencies. 50 C.F.R. § 402.03.
23 FWS and NMFS noted that establishing regulations on consultation was consistent with their
24 obligation to create regulations that promoted the conservation of listed species and that they had
created these regulations with the approval of Congress. 51 Fed. Reg. 19926, 19928 (FWS and
NMFS, June 3, 1986). The Ninth Circuit has found those regulations to be binding upon other
agencies. Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1053-55 (9th Cir. 1994); Sierra Club
v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995). Accordingly, the regulations are binding on EPA.
EPA itself does not argue otherwise.").

1 that jurisdiction is to be recognized and applied. The great principles of equity, securing
2 complete justice, should not be yielded to light inferences, or doubtful construction.” Id. at 313
3 (citations omitted).

4 CropLife has pointed to no express ESA language that constrains the Court’s equitable
5 remedial powers. To the contrary, the ESA citizen suit provision authorizes lawsuits to “enjoin
6 any person . . . alleged to be in violation of” the ESA or its implementing regulations and gives
7 the courts jurisdiction “to enforce any such provision or regulation.” 16 U.S.C. § 1540(g)(1).
8 The citizen suit provision expressly reserves the court’s authority to craft appropriate injunctive
9 and equitable relief. See id. § 1540(g)(5) (“the injunctive relief provided in this subsection shall
10 not restrict any right which any person (or class of persons) may have . . . to seek any other
11 relief.”).

12 E. Section 7(d) Erects No Bar to Injunctive Relief.

13 CropLife erroneously asserts that Section 7(d) controls injunctive relief for Section
14 7(a)(2) violations. CropLife Motion at 10 & n.10. First, on its face, Section 7(d) applies only
15 “[a]fter initiation of consultation.” Since consultation is not initiated until EPA submits an
16 effects determination and an adequate consultation package to NMFS, Section 7(d) is
17 inapplicable to many of the pesticide uses subject to the injunction. See Pacific Rivers Council,
18 30 F.3d at 1056 (“we have previously made it clear that § 7(d) does not serve as a basis for any
19 governmental action unless and until consultation has been initiated”) (emphasis added); 50
20 C.F.R. § 402.12 (c)-(e) (formal consultation is not initiated until action agency submits pertinent
21 information, best available science, and any other information required to complete
22 consultation).

23 Second, EPA has made only one Section 7(d) determination that is limited to EPA’s
24 initial “not likely to adversely affect” determinations. EPA Ex. 6 (Aug. 8, 2003) (Docket No.

179). Because the Court’s injunction already exempts pesticides receiving “not likely to affect determinations,” it excludes the pesticide uses covered by EPA’s only Section 7(d) determination. CropLife is trying to stretch Section 7(d) beyond its reach on the facts of this case.⁸

In any event, Section 7(d) does not provide the standard for granting injunctive relief, but rather it prevents an agency from taking preliminary actions that commit it to a planned project while the agency is still evaluating the project’s effects on listed species. Congress added Section 7(d) in 1978 in the wake of the Supreme Court’s decision in TVA to prohibit activities that create momentum toward completing the project. As one court explained:

Congress enacted § 7(d) to prevent Federal agencies from “steamrolling” activity in order to secure completion of the projects regardless of the impacts on endangered species. As the Supreme Court noted, the District Court was concerned in TVA v. Hill because “a large portion of the \$78 million already expended would be wasted.” In response, Congress enacted § 7(d) to preclude the investments of large sums of money in any endeavor if (1) at the time of the investment there was a reasonable likelihood that the project, at any stage of development, would violate § 7(a)(2), and (2) that investment was not salvageable (i.e. it could not be applied to either an alternative approach to the original endeavor or to another project.)

North Slope Borough v. Andrus, 486 F. Supp. 332, 356 (D.D.C. 1979). Accordingly, Section 7(d) prevents agencies from taking actions, such as entering into contracts, signing leases, or constructing associated facilities, that commit it to a planned project while the agency is still evaluating the project’s effects on listed species. See, e.g., Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1128 (9th Cir. 1998) (§ 7(d) barred execution of contracts prior to

⁸ CropLife contended earlier in this case that § 7(d) constrains only “new resource commitments,” and not ongoing actions because its mandates apply to “the permit or license applicant,” rather than permittees or license holders. CropLife Opposition to Further Injunctive Relief at 15-16 & n.16. If correct, § 7(d) would be wholly inapplicable to the pesticide registrations at issue.

1 completion of consultation); Marsh, 816 F.2d at 1389 (§ 7(d) precluded construction of highway
2 outside species' habitat during consultation).

3 While the district court refused to stop construction of a sewage discharge tunnel in Bays'
4 Legal Fund v. Browner, 828 F. Supp. 102, 113 (D. Mass. 1993), the court found no violation of
5 Section 7(a)(2) or Section 7(d). EPA had twice found no listed species would suffer any adverse
6 effects from the sewage discharge tunnel, id. at 106-07, and the court found the contrary
7 concerns expressed by the plaintiffs to be speculative. Id. at 108-09. In contrast, this Court has
8 held that EPA is in violation of Section 7(a)(2) and that "significant, potentially harmful activity
9 is presently ongoing in the face of a substantial unremedied procedural violation of the ESA."
10 Aug. 16, 2003 Order at 16.

11 Section 7(d) in no way constrains this Court's equitable discretion to remedy violations
12 of § 7(a)(2). Instead, it protects the integrity of the consultation process. As the Ninth Circuit
13 explained in Conner v. Burford, 848 F.2d 1441, 1455 n.34 (9th Cir. 1988): "Section 7(d) does not
14 amend section 7(a) to read that a comprehensive biological opinion is not required before the
15 initiation of agency action so long as there is no irreversible or irretrievable commitment of
16 resources." See also Pacific Rivers Council, 936 F. Supp. at 745-48 (action agency may not
17 unilaterally determine under § 7(d) that action undergoing consultation may proceed before
18 completion of that consultation).

19 F. CropLife's Economic Evidence Must Be Stricken or Disregarded.

20 The focal point of the motions for a stay is economic harm to individual growers. It is
21 unfortunate that EPA has been so recalcitrant in meeting its Section 7 obligations and has failed
22 to institute safeguards to protect salmon in a timely manner. It is EPA's failure to comply with
23 the ESA that has generated the need for injunctive relief to protect salmon while EPA takes the
24 long-overdue actions. It is truly unfortunate that EPA's inaction may necessitate changes in

1 farming practices in ways that may create additional burdens for farmers. However, as this
2 opposition explains, supra at 8-10, and as this Court indicated in its August 8, 2003 Order,
3 economic impacts are not relevant and must be disregarded in determining injunctive relief under
4 Section 7. Aug. 8, 2003 Order at 1 n.1. Because Congress altered the traditional injunction
5 balancing in the ESA, the declarations and exhibits submitted by both sets of intervenors in
6 support of their motions for a stay should either be stricken or disregarded.

7 II. THIS CASE ARISES UNDER THE ESA, NOT THE APA.

8 A. The APA Provides a Cause of Action Only Where There Is No Other Remedy at
9 Law Like That Provided in the ESA.

10 CropLife tries to convert this case into something it is not by arguing that this case arises
11 under the APA. CropLife Motion at 2-5. The APA provides an avenue for judicial review for
12 “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704.
13 By its plain terms, APA review is unavailable if it would duplicate established statutory
14 procedures authorizing judicial review of agency actions. See Bowen v. Massachusetts, 487 U.S.
15 879, 903 (1988).

16 The ESA citizen suit provision is such a statute. It authorizes citizen suits “to enjoin any
17 person, including the United States and any other governmental instrumentality or agency . . .
18 who is alleged to be in violation of any provision of this chapter or any regulation issued under
19 the authority thereof.” 16 U.S.C. § 1540(g)(1)(A). Citizen suits have routinely been brought
20 against federal agencies for failure to comply with Section 7. See, e.g., Pacific Rivers Council,
21 30 F.3d at 150. Where the ESA citizen suit provision provides for judicial review, the APA
22 cannot be invoked.

23 The Supreme Court addressed the parameters for ESA and APA review in Bennett v.
24 Spear, 520 U.S. 154, 173-74 (1997). In Bennett, a unanimous Supreme Court held that the

1 expert wildlife agencies – NMFS and the Fish and Wildlife Service (“FWS”) – could not be sued
2 under the ESA citizen suit for “failure to perform [their] duties as administrator of the ESA,”
3 except under an express citizen suit authorization pertaining to the ESA listings and critical
4 habitat designations. In contrast to the Services’ “maladministration of the ESA,” *id.* at 174,
5 ESA citizen suits may be brought to enjoin other federal agencies’ violations of the ESA’s
6 mandates. As the Supreme Court explained, “§ 1540(g)(1)(A) is a means by which private
7 parties may enforce the substantive provisions of the ESA against regulated parties – both private
8 parties and Governmental agencies – but is not an alternative avenue for judicial review of the
9 Secretary’s implementation of the statute.” *Id.* at 173 (emphasis added).

10 Under Bennett, EPA, like other action agencies, may be sued under the ESA citizen suit
11 for failing to consult or avoid jeopardy, as mandated by Section 7(a)(2). See Sierra Club v.
12 Glickman, 156 F.3d 606, 616-17 (5th Cir. 1998) (claims challenging failure to comply with § 7
13 can be brought as ESA citizen suit). In contrast, NMFS’ or FWS’ actions in discharging their
14 Section 7(a)(2) obligations are reviewable under the APA. See Bennett, 520 U.S. at 177-78;
15 Pacific Coast Fed. of Fishermen’s Ass’ns v. NMFS, 265 F.3d 1028 (9th Cir. 2001) (reviewing the
16 adequacy of NMFS’ biological opinions under APA).⁹

17 B. The APA’s “Final Agency Action” Requirement Is Inapplicable.

18 APA review is limited to “final agency action.” 5 U.S.C. § 704. The ESA citizen suit
19 provision contains no analogous constraint. In Bennett, the Supreme Court rejected the notion
20

21 ⁹ Arizona Cattle Growers’ Ass’n v. FWS, 273 F.3d 1229, 1235 (9th Cir. 2001), involved an APA
22 challenge to a FWS incidental take statement incorporated into a biological opinion issued
23 pursuant to ESA Section 7. It, therefore, falls squarely within Bennett’s authorization of APA
24 review of the expert agency’s administration of its ESA duties. The cases cited by CropLife at
page 2 & n.1 did not arise under the APA; they borrowed the APA’s standard of review, but not
its jurisdictional limitations. See Water Keeper Alliance v. Dep’t of Defense, 271 F.3d 21, 31,
(1st Cir. 2001); Cabinet Mt. Wilderness v. Peterson, 685 F.2d 678, 685-86 (D.C. Cir. 1982).

1 that the ESA citizen suit provision applied to the Services' actions as administrators of the ESA,
2 since it would "effect a wholesale abrogation of the APA's 'final agency action' requirement."
3 520 U.S. at 174. Conversely, Greenpeace v. NMFS, 80 F. Supp.2d 1137, 1151 (W.D. Wash.
4 2000), rejected arguments comparable to those made here in an ESA citizen suit challenge,
5 noting: "The primary fallacy with NMFS' position is its preoccupation with the APA's
6 requirement of final agency action."

7 Even if, however, a finality requirement applied, it would not bar review here. EPA's
8 failure to comply with Section 7 over the 12 years since the first salmon listing supplied any
9 requisite finality. See, e.g., Sierra Club v. Glickman, 156 F.3d at 618 n.7. Even though EPA
10 regularly made determinations in its re-registration assessments that pesticide uses would likely
11 result in residues that harm salmon, it never initiated Section 7 consultations on the uses.
12 CropLife's plea for greater finality seeks to turn EPA's failure to comply with Section 7 into an
13 exemption from an ESA citizen suit seeking to compel such compliance. To prevent such an
14 evisceration of Section 7(a)(2), courts have repeatedly compelled agencies to comply with
15 Section 7 and enjoined actions from proceeding until such compliance. See, e.g., cases cited
16 supra at 11-14.

17 C. It Is the ESA's Mandatory Section 7 Duties, Not the APA's Unreasonable Delay
18 Standard, That Controls.

19 This case arises under the ESA, and the courts have mandated strict compliance with the
20 ESA's Section 7 mandates. A long line of Ninth Circuit case law clarifies that the ESA removes
21 the traditional equitable balancing in establishing remedies for Section 7 violations. See, e.g.,
22 Thomas, 753 F.2d at 763-65; see also supra at 11-14.

23 CropLife seeks to circumvent the ESA's standards by urging this Court to apply the
24 APA's multi-factor unreasonable delay standard as set forth in TRAC v. FCC, 750 F.2d 70, 80

(D.C. Cir. 1984). This Court properly found the unreasonable delay body of case law “neither binding nor persuasive” because “this lawsuit does not arise under the APA.” July 2, 2002 Order at 16. Even if, however, the Court were to apply the so-called TRAC factors, the result would remain the same. The ESA’s overriding emphasis on species protection would “supply content for this rule of reason” that governs the time agencies may permissibly take in discharging their duties. See Independence Mining Co. v. Babbitt, 105 F.3d 502, 507 n.7 (9th Cir. 1997) (quoting TRAC v. FCC, 750 F.2d at 80)). Because the ESA makes protection of endangered species “the highest of priorities,” TVA v. Hill, 437 U.S. at 194, and it imposes affirmative obligations on agencies to ensure that their actions will not jeopardize species’ survival, the statute compels speedy action and does not tolerate the lengthy delays and recalcitrance exhibited by EPA.¹⁰

D. This Case Raises Challenges to Specific Agency Actions, Rather Than a Broad Programmatic Challenge.

CropLife tries to equate this case with a broad, amorphous programmatic challenge that is impermissible under the APA under Lujan v. National Wildlife Fed’n, 497 U.S. 871 (1990). As this Court held in its July 2002 Order (at 10-11), Lujan is inapposite because this case arises under the ESA and because the Coalition mounts a discrete challenge to EPA’s failure to comply with Section 7(a)(2) with respect to its pesticide registrations. Moreover, the Court held that the Coalition had standing to challenge only those pesticide registrations for which it had provided evidence of potential harm to salmonids. Id. at 11. Given the focused nature of this case, and

¹⁰ While CropLife places great weight on the preliminary decision in Center for Biological Diversity v. Whitman, No. C-02-1580 JSW (N.D. Cal. June 30, 2003), this Court had before it the evidence found lacking there. Specifically, the Coalition introduced EPA’s own risk assessments and re-registration eligibility decisions in which EPA found that its authorized pesticide uses may harm salmon, their food supply, or their habitat, as well as the USGS detections of the pesticides in salmon streams. See supra at 3. Rather than act on the evidence before it, EPA had re-registered pesticides and kept registrations in place for lengthy periods of time, while relegating ESA compliance to later Section 7 consultations that it never initiated.

CropLife's failure to offer any alternative scenario for obtaining judicial review, CropLife's programmatic objection would preclude judicial review altogether and condone EPA's rampant disregard of its Section 7(a)(2) obligations that put listed salmon at risk. Not surprisingly, the courts have found no bar based on Lujan to hearing Section 7(a)(2) claims challenging an agency's failure to consult on its ongoing actions. See Pacific Rivers Council, 30 F.3d at 1053-56 (enjoining ongoing forest management pending completion of consultation on applicable land management plans); Greenpeace, 106 F. Supp.2d at 1080 (enjoining ongoing groundfishing activities licensed by the federal government in the absence of a completed consultation); Center for Biological Diversity, Slip Op. at 9 n.5 ("Plaintiff has challenged specific agency actions, and this argument [made by CropLife as amici in that case] is without merit.").

E. CropLife's Technical Objection to the Lack of an Administrative Record Is Without Merit.

CropLife's insistence that this case should not proceed until after EPA filed an administrative record is without merit. This case challenges EPA's failure to comply with its Section 7(a)(2) obligations, and CropLife does not explain what administrative record would have been generated to support actions that EPA never took.

In contrast, the cases cited by CropLife (at 5) involved challenges to specific actions taken by an agency, where review logically must be based on the record that formed the basis for the agency action. Even under the APA, cases seeking to compel agency action that has been unlawfully withheld or unreasonably delayed often proceed without an administrative record since agencies rarely generate a record when they have been tardy or recalcitrant in carrying out their obligations. See, e.g., Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir. 2000) (In failure to act case, "review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record.").

1 CropLife's recitation of APA record review cases challenging agency actions miss the mark
2 given that this case challenges EPA's longstanding failure to act.

3 In addition, CropLife never identifies the agency documentation that should have been,
4 but was not, before the Court. The Coalition submitted EPA's own risk assessments and re-
5 registration eligibility decisions for the pesticides at issue and the USGS surface water
6 monitoring reports, which substantiated the adverse impacts of the pesticides on salmon. EPA
7 never disputed its failure to take any steps to comply with Section 7(a)(2) in the face of this
8 evidence, nor did it contend that the Court needed to consider other agency processes or
9 documents to rule on the Section 7(a)(2) claim.

10 Finally, not even CropLife contends that the Court erred in considering the evidence
11 submitted by the parties in ruling on the motion for further injunctive relief. Given that this
12 appeal challenges the propriety of the injunction, any technical objections to the evidentiary basis
13 for the merits decision offer no support for staying the injunction pending appeal.

14 III. THE ESA, NOT FIFRA, SUPPLIES THE CONTROLLING LAW.

15 A. This Case Arises Under the ESA, Not FIFRA.

16 In its July 2002 Order (at 5), this Court rejected CropLife's contention that "plaintiffs'
17 claims constitute an impermissible challenge to valid FIFRA-governed pesticide registrations":

18 Plaintiffs do not challenge any pesticide registrations. Rather, plaintiffs challenge
19 EPA's alleged failure to consult with NMFS regarding the effects of such
20 registrations on threatened and endangered salmonids. When Congress vests an
21 agency with responsibility for administering a statute, such as EPA's
22 administration of FIFRA, the ESA nevertheless applies to agency actions taken
23 pursuant to that statute. Thus, FIFRA and its procedures do not govern plaintiffs'
24 claims.

25 The case most directly on point is Defenders of Wildlife v. EPA, 882 F.2d 1294 (8th Cir.
26 1989), which CropLife mentions only in a footnote at 18 n.21. In Defenders, the environmental
27 plaintiffs sought to compel EPA to bring its registration of strychnine into compliance with the

1 ESA. The district court and Eighth Circuit rejected the argument that the plaintiffs had to
2 proceed under FIFRA. The district court held that EPA's continued registration of strychnine
3 violated the ESA and enjoined EPA to prohibit certain strychnine uses and to add safeguards,
4 including a buffer, for other uses. 688 F. Supp. 1334, 1355-57 (D. Minn. 1988). The court of
5 appeals affirmed the injunction prohibiting "EPA from continuing strychnine registrations under
6 these circumstances." 882 F.2d at 1301. The fact that the injunction constrained pesticide uses
7 otherwise allowed under an EPA pesticide registration did not convert the case into a FIFRA
8 challenge.¹¹

9 Similarly, in Merrell v. Thomas, 807 F.2d 776, 782 n.3 (9th Cir. 1986), the Ninth Circuit
10 heard a claim that EPA must prepare an environmental impact statement pursuant to the National
11 Environmental Policy Act on its registration of a pesticide, without requiring the plaintiff to
12 exhaust FIFRA administrative remedies. See also Sierra Club v. Peterson, 705 F.2d 1475, 1478
13 (9th Cir. 1983) (lack of FIFRA citizen suit did not bar action seeking compliance with California
14 notification standards for aerial spraying). Likewise, in Headwaters v. Talent Irrigation Dist.,
15 243 F.3d 526 (9th Cir. 2001), a citizen suit challenged application of an herbicide to irrigation
16 canals without a Clean Water Act discharge permit. The Ninth Circuit rejected the contention
17 that no permit was required because the EPA registration did not require one. FIFRA did not bar

18 ¹¹ In its footnote (at 18 n.21), CropLife contends that Defenders of Wildlife stands for the
19 proposition that the ESA may control on a point where FIFRA does not purport to be
20 comprehensive. To the contrary, Defenders of Wildlife held that the ESA citizen suit provision
21 "permits Defenders to sue the EPA in an effort to enjoin any asserted violations of the ESA
22 The district court properly permitted Defenders to proceed under the citizen suit provision." 882
23 F.2d at 1300 & 688 F. Supp. at 1352-53 (hearing §§ 7(a)(1), 7(a)(2) and 9 claims against EPA
24 under ESA citizen suit provision). The portion of Defenders cited by CropLife concerned claims
25 for violations of statutes that, unlike the ESA, lacked their own citizen suit provision. Such
26 claims could not be heard under the APA because FIFRA provided a statutory mechanism for
obtaining judicial review. 882 F.2d at 1301-02.

1 the claim because the Clean Water Act constrains pollution discharged into navigable waters
2 based on local environmental conditions and without FIFRA's cost-benefit balancing, while
3 FIFRA establishes a nationally uniform pesticide label system. Id. at 531-32. In each of these
4 cases, compliance with environmental statutes or the relief ordered by the court might limit a
5 FIFRA-authorized pesticide use, yet none of the courts viewed that overlap to convert the case
6 into one governed by FIFRA's standards or procedures.

7 B. The ESA, Not FIFRA, Provides the Controlling Standards.

8 CropLife persists in arguing that FIFRA standards govern the Court's issuance of
9 injunctive relief to remedy an ESA violation. It seeks to avail itself of the risk-benefit standard
10 embodied in FIFRA, rather than the ESA's precautionary standard that alters the traditional
11 injunction balancing. The Court should again reject CropLife's mischaracterization of this case
12 in order to change the controlling standards.

13 Throughout its brief, CropLife makes vague references to FIFRA Section 6, which
14 contains FIFRA's procedures for canceling and suspending pesticide registrations. CropLife
15 appears to claim that Congress, in FIFRA Section 6, redefined the public interest and restructured the
16 ESA balance to favor crop production over protection of endangered species, even though
17 nothing in FIFRA makes this explicit. CropLife Motion at 13, 16. This argument could be made
18 in every ESA Section 7 case by claiming that an agency's primary mission trumps the ESA's
19 mandates. In TVA v. Hill, 437 U.S. at 181-84, 185, the Supreme Court highlighted Congress's
20 omission of proposed qualifiers that would have made federal agencies' Section 7's obligations
21 applicable "insofar as is practicable and consistent with the[ir] primary purposes," concluding
22 that it "reveals a conscious decision by Congress to give endangered species priority over the
23 'primary missions' of federal agencies."

24 More particularly, contrary to CropLife's depiction, FIFRA's imminent hazard standard

1 was never intended to govern relief in ESA cases, nor was it designed to supersede the ESA's
2 mandates. First, FIFRA's imminent hazard suspension authority predates the ESA. FIFRA
3 contained essentially the same imminent hazard definition and authority prior to enactment of the
4 ESA. The ESA technical amendment cited by CropLife (at 16-17 n.17) simply substituted
5 references to the ESA for the predecessor statute to identify harm to imperiled species that could
6 warrant suspension of a pesticide registration. Pub. L. No. 93-205, § 13(f), 87 Stat. 903 (1973).
7 Given EPA's longstanding authority to suspend pesticide registrations to protect imperiled
8 species, FIFRA Section 6 cannot be read to integrate ESA Section 7 into FIFRA in a manner that
9 overrides the ESA standards and case law.

10 Second, FIFRA Section 6(c) governs EPA's authority to suspend a pesticide registration
11 during a cancellation proceeding; it has no bearing on a court's authority to remedy an ESA
12 violation. Because FIFRA imminent hazard suspension provision is directed at and controls
13 EPA's authority, and not the courts', it cannot be read to override the ESA's injunction standard
14 or the courts' equitable remedial powers.

15 Third, FIFRA's imminent hazard provision is but one FIFRA mechanism for protecting
16 endangered species from pesticide impacts. Under FIFRA, pesticides may not be registered if
17 their use will result in "unreasonable adverse effects on the environment." 7 U.S.C. §
18 136a(c)(5). In Defenders of Wildlife, 882 F.2d at 1299, the court of appeals found ample room
19 to incorporate the ESA into this standard, concluding that "a pesticide registration that runs
20 against the clear mandates of the ESA will most likely cause an unreasonable adverse effect on
21 the environment under FIFRA." While FIFRA ordinarily allows economic factors to be taken
22 into account in deciding whether environmental impacts are unreasonable, Congress' judgment
23 in the ESA that extinction results in an incalculable loss predetermines the outcome of that
24

balancing in favor of protecting the species. See TVA v. Hill, 437 U.S. at 187-88. Rather than supersede the ESA, FIFRA's environmental standard and suspension authority give EPA ample authority to ensure that pesticide registrations comply with the ESA.¹²

CropLife also relies on Section 1010 of the 1988 ESA amendments. CropLife Motion at 13, 16-17 & n.17. However, that amendment merely directed EPA to conduct a study to identify means to implement endangered species protections "which would comply with the Endangered Species Act of 1973, as amended, and which would allow persons to continue production of agricultural food and fiber commodities." Pub. L. No. 478, § 1010, 102 Stat. 2313, 7 U.S.C. § 136a note. EPA provided such a report to Congress in 1991. Ex. 1 to 3rd Goldman Decl. This amendment has no ongoing effect and offers no basis for modifying ESA Section 7 or the ESA injunction standard.

C. The Injunction's Point of Sale Notifications Do Not Conflict With FIFRA.

CropLife contends (at 15) that the urban point of sale notifications conflict with FIFRA's labeling provisions. This contention lacks merit for two reasons.

First, the Ninth Circuit held in Chemical Specialties Mfrs. Ass'n v. Allenby, 958 F.2d 941 (9th Cir. 1992), that point of sale warnings are not "labeling" within the meaning of FIFRA, which eliminates the purported basis for a FIFRA conflict here. In Chemical Specialties Mfrs., pesticide manufacturers argued that the point of sale warnings required under California's Proposition 65 were expressly preempted by FIFRA and impliedly preempted because manufacturers could not provide the warnings without obtaining EPA approval to change the product labeling. While FIFRA authorizes states to impose more stringent use restrictions than

¹² Even under FIFRA, the registrant bears the burden of proving that a pesticide "poses no safety threat," and an imminent hazard exists if there is a "substantial likelihood that serious harm will be experienced." See Environmental Defense Fund v. EPA, 510 F.2d 1292, 1297, 1302 (D.C. Cir. 1975).

1 imposed under FIFRA, it preempts additional state labeling requirements. 7 U.S.C. § 136v.
2 FIFRA defines “labeling” as “all labels and all other written, printed, or graphic matter
3 accompanying the pesticide . . . at any time.” Id. § 136p(2). The Ninth Circuit held that point of
4 sale notifications are not labeling because they “are not attached to the immediate container of a
5 product and will not accompany the product during the period of use.” 958 F.2d at 946; see also
6 id. (“FIFRA’s definition of labeling cannot encompass every type of written material
7 accompanying the pesticide at any time. If this were true, then price stickers affixed to the
8 shelves, sheets indicating that a product is on sale, and even the logo on the exterminator’s hat
9 would all constitute impermissible labeling.”). The court distinguished written materials aimed
10 at the user of a product from those targeting the purchaser. Id. at 946-47; see also New York
11 State Pesticide Commission v. Jorling, 874 F.2d 115, 119 (2d Cir. 1989) (state regulations
12 requiring notifications to prospective purchasers and posting of signs in sprayed areas are not
13 preempted as labeling because they are not “designed to be read and followed by the end user”
14 but instead “the target audience . . . is those innocent members of the general public who may
15 unwittingly happen upon an area where strong poisons are present as well as those who contract
16 to have pesticides applied.”).

17 The point of sale notifications required by this Court’s injunction need not be affixed to
18 the product, nor must they accompany the product through the channels of commerce. In fact,
19 the principal method of distributing the notifications is through a separate mailing, rather than
20 with the products. More fundamentally, the point of sale notifications are designed to inform
21 purchasers about the products prior to buying the product, rather than to provide directions to be
22 followed by the end users. Accordingly, under Chemical Specialties Mfrs., the point of sale
23 notifications do not constitute labeling, and the postulated conflict with FIFRA has no basis.

1 Second, EPA has made it clear that compliance with the Court's Order will not subject
2 intervenors to misbranding liability under FIFRA. In a Federal Register notice alerting retailers
3 and state agencies to the point of sale warnings, EPA has stated:

4 The January 22 Order does not direct defendant-intervenors to distribute the point
5 of sale notifications as "labeling" within the meaning of section 2(p) of FIFRA.
6 To the extent, however, that intervenors or pesticide registrants wish to distribute
7 the point of sale notification developed by EPA as labeling, EPA will exercise its
8 enforcement discretion authority. This will allow defendant-intervenors to
9 distribute the notifications for the duration of the Court's injunction without
10 notifying EPA, without seeking or obtaining approval from EPA and without the
11 need for establishing registration or reporting regarding the production of the
12 notification. Further, EPA will not take enforcement actions on the basis of
13 misbranding under FIFRA, solely with respect to the point of sale notification
14 materials that may be attached to or accompany any of the subject pesticide
15 products.

16 Ex. 2 to Fed. Defs.' Status Report (Mar. 22, 2004). EPA has, therefore, eliminated any basis for
17 CropLife's fears that "[a] manufacturer cannot alter a label without EPA's approval" and
18 "[a]lteration of an EPA-approved label can result in civil or criminal penalties." CropLife
19 Motion at 15.

20 IV. THE LATE-FILED DECLARATIONS SUFFER FROM EVIDENTIARY DEFECTS.

21 A. The Expert Evidence Should Be Stricken Because the Deadline for Expert 22 Witness Disclosures and Discovery Has Passed.

23 Not only is evidence of economic harm irrelevant under ESA Section 7, see supra at 8-
24 10, but the expert declarations and exhibits should be stricken because they are simply too late.
25 After plaintiffs filed their motion for further injunctive relief, the Court approved a stipulated
26 schedule for expert witness disclosures and discovery. Docket No. 106. Under that order, EPA
and the defendant-intervenors had until March 21, 2003 to make expert disclosures and the
Coalition had to complete deposition and discovery of these experts by May 2, 2003. These
deadlines have long since passed. Nonetheless, EPA, CropLife, and the Farm Bureau have
submitted expert evidence long after that date.

1 *I. EPA's Submission of Preliminary Economic Analyses*

2 On August 14, 2003, EPA attached two preliminary analyses addressing the economic
3 impacts of the requested injunction to a notice of filing, suggesting that it might introduce the
4 exhibits into evidence at the August 14, 2004 hearing, which EPA never did. Docket No. 185. It
5 is difficult to ascertain who prepared the analysis, let alone their expert credentials. The EPA
6 analysis does not even identify an author. A cover memorandum identifies the U.S. Department
7 of Agriculture office, but not the individuals who prepared the other analysis. EPA never
8 disclosed expert economists in conjunction with these studies, nor did it provide a curriculum
9 vitae or other summary of credentials that might qualify the authors as experts. Obviously, these
10 submissions do not meet the prerequisites for expert reports. CropLife has, nonetheless,
11 selectively relied on the study that projected the highest economic losses in its motion in this
12 Court (at 20), as well as in its motion to the court of appeals.

13 The Coalition asks the Court to strike these two preliminary reports from the record.
14 While this Court has made it clear that it will disregard evidence of economic impacts in crafting
15 injunctive relief, Aug. 8, 2003 Order at 1 n.1, CropLife has continued to rely on these
16 preliminary reports before this Court and the court of appeals, as well as in the media. Allowing
17 them to remain in the record may be perceived to give these reports an implicit aura of
18 credibility. Because they fall far short of the standards for expert evidence, they should be
19 stricken.

20 Alternatively, the Coalition is submitting the expert declaration of Ed Whitelaw, who
21 concludes that these studies are “inconsistent with widely accepted standards applicable to this
22 type of setting” and that they provide “a biased, arbitrary assessment of the potential economic
23 impacts that might follow” from the injunction because, inter alia, they exaggerate impacts by
24 assuming the injunction would apply to 54 instead of 38 pesticides, employ the “dumb farmer

1 scenario” that ignores adaptations that farmers customarily make in response to changing
2 economic and environmental conditions, and disregard potential economic benefits from the
3 buffers. Whitelaw Decl. 6-7. Moreover, even though the EPA study concluded there “will be
4 minimal economic impact to growers from the 20-yard buffer” and a likely impact of just over
5 \$390,000 in all, CropLife recites (at 20) the more inflated worst-case scenario numbers stated in
6 terms of gross, rather than net revenue, from the other study. *Id.* ¶ 6(e); *cf.* Docket. No. 185 Ex.
7 16 at 2-3 with Ex. 15 at 2.

8 2. *The Farm Bureau’s Submission of a Declaration Disagreeing With EPA’s*
9 *Risk Assessment Methods*

10 The Farm Bureau has submitted the Declaration of Allan S. Felsot, which attacks the
11 ecological risk assessment model used by EPA in assessing the impacts of pesticides on fish and
12 their habitat. This declaration is simply too late under the schedule governing expert witnesses
13 in this case. The Farm Bureau candidly admitted that it submitted this declaration after the close
14 of discovery when the Coalition sought expert disclosures with respect to the Felsot Declaration
15 pursuant to Fed. R. Civ. P. 26(a)(2)(B). The Farm Bureau refused to make such disclosures, in
16 large part, because “the applicable discovery period has closed.” Letter to Patti Goldman,
17 counsel for the Coalition, from Karen Budd-Falen, counsel for Farm Bureau (April 12, 2004),
18 attached to Fourth Declaration of Patti Goldman as Exhibit 1.

19 EPA’s risk assessments have formed an underpinning of this case since its early stages.
20 The Coalition introduced EPA risk assessments in support of its motion for summary judgment
21 and relied on EPA’s estimates that authorized pesticide uses would result in environmental
22 concentrations that exceed its level of concern for fish, their prey, or their habitat. 1st, 2nd, & 3rd
23 Code Decs. EPA’s expert, Arthur Jean Williams, described EPA’s risk assessment in a
24 declaration dated March 21, 2002, and the Court’s summary judgment ruling in July 2002

1 credited EPA's risk assessments as "document[ing] the potentially-significant risks posed by
2 registered pesticides to threatened and endangered salmonids and their habitat." July 2, 2002
3 Order at 15 n.25. Another EPA expert, Dr. Norman Birchfield, elaborated on EPA's risk
4 assessment models in his declaration filed a year later in March 2003, as did EPA witness Laura
5 Parsons. CropLife also submitted numerous expert declarations along with its opposition to the
6 motion for further injunctive relief on behalf of all of the intervenors, including the Farm Bureau
7 and Potato Commission.¹³

8 Not only is this evidence too late, but it seeks to propel the Court in a scientific inquiry
9 that the ESA assigned to NMFS. Indeed, this Court refused to conduct a full-blown evidentiary
10 hearing on these issues because "it is the responsibility of neither plaintiffs nor the Court to
11 determine the precise effects of EPA-registered pesticide active ingredients on threatened and
12 endangered salmonids. Rather, EPA and NMFS shall make these determinations via the fact-
13 intensive inquiry of the section 7(a)(2) consultation process." Aug. 8, 2003 Order at 19.

14 3. *CropLife's Submission of an Expert on the Asparagus Industry*

15 CropLife has submitted the Declaration of Alan Schreiber, director of the Washington
16 Asparagus Commission, to opine on the asparagus industry in Washington State. Not only is this
17

18 ¹³ The Felsot Declaration highlights aspects of EPA's risk assessments that may overestimate
19 risk, but never grapples with the many aspects of EPA's risk assessments that underestimate real-
20 world exposures and risk. As this Court recognized in its August 16, 2003 Order at 14-16, the
expert fish and wildlife agencies have criticized EPA for focusing on lethal doses and ignoring
pervasive and pernicious sublethal effects.

21 The Felsot Declaration also asserts that pesticide runoff does not occur in eastern
22 Washington and therefore EPA's models are inapplicable to that region. However, in the U.S.
23 Geological Survey monitoring in the Yakima basin, detection frequencies and concentrations
24 spiked during the irrigation season, and concentrations of the most widely detected insecticide
exceeded the chronic-toxicity guideline for protection of aquatic life in 50% of the samples. Ex.
22 to 3rd Code Decl. at 14, 31, 40.

1 declaration legally irrelevant, see supra at 8-10, but it is being submitted long after the deadline
2 for expert witness disclosures and discovery.¹⁴

3 B. The Factual Evidence Fails to Substantiate the Exaggerated Assertions of Harm.

4 Both the Farm Bureau and CropLife have submitted declarations that purport to calculate
5 individual losses from this Court's January 22, 2004 Order. As a preliminary matter, the
6 evidence submitted is spotty and anecdotal at best. In total, the declarations describe impacts
7 from less than two-thirds of the pesticides subject to the injunction at isolated locations. Neither
8 CropLife nor the Farm Bureau has submitted any evidence of harm in California or in other areas
9 covered by the injunction, such as the range of Lower Columbia River chinook and chum, Hood
10 Canal chum, and the Snake River Basin salmonids. Even if the Court could make credible
11 findings based on the declarations, which it cannot for the reasons discussed below, at most those
12 findings would be limited to isolated situations and locations with no evidence establishing a
13 pervasive trend.

14 The declarations are uniformly flawed. They routinely fail to provide essential
15 information to establish the extent to which individuals are precluded from using their chosen
16 pesticides by this Court's January 22 Order, namely whether the pesticides are covered by the
17 Order and whether the farm is located in close proximity to salmon waters as defined in the
18 Order.

19 For example, CropLife contends the injunction will impede government noxious weed
20 programs, even though the Order excludes such programs operated according to NMFS

21 ¹⁴ Like the Farm Bureau, CropLife has refused to make expert disclosures for Dr. Schreiber or to
22 respond to discovery due to the discovery cutoff. Letter to Coalition's Counsel from CropLife's
23 Counsel (Apr. 7, 2004) (Ex. 2 to 4th Goldman Decl.) (refusing to make expert disclosures
24 because CropLife does not plan to use Dr. Schreiber at trial); letter to Coalition's counsel from
CropLife's counsel (Apr. 13, 2004) (Ex. 3 to 4th Goldman Decl.) (indicating CropLife may not
respond to the Coalition's production request because "discovery in this case closed long ago.").

1 safeguards. Order III.D.2. CropLife has submitted the Declaration of Jason Kehrberg, the
2 herbicide applicator for the Grant Weed Control, a subdivision of the Grant Soil and Water
3 Conservation District in Oregon. However, Mr. Kehrberg never acknowledges that the
4 injunction contains an exclusion for noxious weed programs administered by public entities, like
5 the Grant Soil and Water Conservation District, subject to safeguards routinely required by
6 NMFS for such programs. Nor does he address whether his noxious weed spraying conforms to
7 NMFS' safeguards. Instead, his declaration describes the impact the standard buffers would
8 have in the absence of such an exclusion. His assertions of harm lack credibility and any
9 foundation.

10 Furthermore, the Order does not apply uniformly throughout the States of Washington,
11 Oregon, and California. It applies only within the range of listed salmon, adjacent to salmon-
12 supporting waters, and to pesticides that have not been excluded based on EPA's effects
13 determinations. Nonetheless, none of the declarations identifies the affected listed salmon, few
14 provide sufficient information to determine whether the affected waters are salmon-bearing, and
15 many claim losses from pesticides that fall within exclusions.

16 With respect to the impacted waters, the Berdan Declaration describes a farm located on
17 Squilchuck Creek. The Washington Department of Agriculture has developed lists of impacted
18 streams using the Order's definition of salmon-supporting waters and streamnet.

19 <http://agr.wa.gov/PestFert/EnvResources/docs/Chelan%20County.pdf>. Squilchuck Creek is not
20 among those listed in Chelan County, which makes it unlikely that Mr. Berdan will suffer any
21 harm from the injunction. The two Estes Declarations describe a pond adjacent to their orchard,
22 but make no allegation that the pond meets the definition of salmon-supporting waters. Several
23 other declarants likewise provide no facts to substantiate the farms' proximity to salmon-
24

1 supporting waters. See, e.g., Knutzen, Jacobs, Pavlicek, Vincent, Duyck, Vanderzanden,
2 Eslinger, Nelson Decls.

3 This lack of precision extends to the pesticides that the declarants assert they must, but
4 cannot, use because of this Court’s January 22 Order. For example, the Vincent Declaration is
5 predicated on an inability to use chlorothalonil in Washington County, Oregon, but
6 chlorothalonil received a “no effect” determination for Oregon Coast coho salmon, the only
7 listed salmon in that county. His entire declaration, which touts his need for this one pesticide,
8 has no foundation and provides no evidence of harm from the injunction. Similarly, the two
9 Miller Declarations (submitted by CropLife and the Farm Bureau, respectively) claim losses if
10 diuron, phosmet, and simazine cannot be used in Chelan County. However, simazine is excluded
11 from the injunction across the board, diuron is excluded in this region due to a no effect
12 determination, and phosmet is excluded due to a not likely to adversely affect determination for
13 Upper Columbia steelhead and chinook. Order III.A.2 & A.3 & nn.5-6. Likewise, the Pavlicek
14 Declaration claims losses from an inability to use atrazine and captan in Marion County, but
15 atrazine has been excluded from the injunction altogether and captan has been excluded for the
16 only listings that could impact that county – Upper Willamette steelhead and chinook. And the
17 list goes on.

18 The Schreiber Declaration, which purports to calculate losses to asparagus crops from
19 this Court’s Order, identifies disulfoton as the most important pesticide used on asparagus. He
20 projects large gross losses without tying disulfoton use or the losses to any identified locations.
21 Since disulfoton is excluded from the injunction due to EPA’s effects determinations for Puget
22 Sound chinook, Lower Columbia steelhead, Hood Canal chum, and Upper Columbia chinook,
23 his declaration fails to substantiate and vastly exaggerates the alleged losses.

1 The Farm Bureau contends that Timothy Hay farmers will be irreparably harmed by the
2 injunction because they use four pesticides at issue in this case. Farm Bureau Motion at 23;
3 Eslinger & Jacobs Decls. However, two of those pesticides – atrazine and dicamba – have been
4 excluded from the injunction’s buffers based on EPA’s no effect determinations. Order III.A.2
5 & n.5.

6 The Kehrberg Declaration asserts that the Order will impede a county noxious weed
7 spraying program. Not only does the Order contain a noxious weed exemption, but two of the
8 four pesticides Mr. Kehrberg uses – diuron and triclopyr – are entirely excluded from the
9 injunction. See also Knutzen Decl. (claiming inability to use carbaryl, disulfoton, ethoprop,
10 methamidiphos, methyl parathion, propargite, and trifluralin, all of which may be used under the
11 Order in the Skagit Valley which falls within the range of Puget Sound chinook based on EPA’s
12 effects determinations); Bryson Decl. (claiming losses from an inability to use oryzalin, phosmet,
13 and simazine, despite no restrictions on their use in Benton County, Washington under the
14 Order); Duyck Decl. (claiming inability to use ethoprop even though it is exempted from the
15 injunction based on its not likely to adversely affect determination for Upper Willamette
16 steelhead, Lower Columbia steelhead, and Oregon Coast coho salmon, the listings in
17 Washington County, Oregon). These assertions with respect to pesticides excluded from the
18 Order lend no support to the intervenors’ claims of harm.

19 The declarations routinely fail to substantiate their exorbitant claims of losses, leading to
20 vastly exaggerated assertions in most instances. For example, the declarants assert losses for the
21 entire buffer zones even though they claim to adhere to label requirements and many of the
22 labels establish buffers around water bodies. For example, the new chlorpyrifos and
23 chlorothalonil labels impose a 25-foot ground and 150-foot aerial buffer, 3d Code Decl. Ex. 7 at
24

94; Shaw Decl. Ex. 9 at 3; EPA’s disulfoton risk assessment recommended a 25-foot vegetated buffer and no aerial applications to protect aquatic life, 1st Code Decl. Ex. 32; and EPA has imposed a 25-foot ground buffer and prohibited most aerial applications of azinphos methyl to protect fish. Third Code Decl. Ex. 5 at 73-74. Crop impacts in the label-mandated buffer zones cannot be attributed to the injunction, yet the declarations sweep losses from those buffers into the mix claimed from this Court’s Order. See Petersen Decl. (asserting some economic losses from the 100-yard buffer for aerial applications of azinphos-methyl); Knutzen & Nelson Decls. (assert that they will suffer losses due to the buffers: (a) for 1,3-dichloropropene, but the injunction establishes only a 1-yard buffer for ground injections of this pesticide; and (b) for propargite, but the injunction incorporates the label restrictions in their location, imposing no additional constraints, see Order III.B.1&4).¹⁵

The declarations give short shrift to alternatives to pesticides covered by the Court’s Order, making conclusory assertions that any alternatives are either too costly or less effective. E.g., Miller Decl. ¶ 11 (asserting without elaboration that “any alternative pesticides that do exist are much costlier and are not as effective”). However, as the Declaration of Ed Whitelaw attests, farmers tend to be resourceful and adaptable, shifting crops and pest control strategies in response to market and environmental changes. Whitelaw Decl. ¶¶ 6 (d), 10-14. More specifically, EPA’s Apple Benefits Assessment, submitted by the Farm Bureau, identifies nonchemical alternatives, such as pheromone mating disruption, as an alternative to azinphos-

¹⁵ The Eslinger Declaration ¶ 5 asserts strict adherence to the label requirements for atrazine but the atrazine label requires buffers that are generally larger than those prescribed in the injunction. Shaw Decl. ¶ 33 & Ex. 7 at 9 (22-yard buffer where surface waters enter streams and 200-foot buffer around lakes and reservoirs). Accordingly, farmers who adhere to label restrictions for atrazine would need to make no changes to comply with the injunction, even if atrazine had not already been excluded from the injunction.

1 methyl and phosmet for controlling codling moths on apples and pears. Farm Bureau Ex. 10 at
2 7-8. EPA found that 50% of the acreage in the western United States already uses this
3 alternative form of pest control and the acreage using this alternative to two of the pesticides
4 subject to this Court's Order and featured in many of the Farm Bureau's declarations is expected
5 to increase in the future. Id. at 17. Independent sources verify the existence of alternative pest
6 control strategies for many of the pesticides at issue in this case. See, e.g.,
7 <http://www.ipm.ucdavis.edu>.

8 Some of the assertions that no alternatives exist are simply not believable. For example,
9 the Pavlicek Decl. asserts that there are no alternatives to metolachlor on wheat, even though
10 alternatives are used in California, which is phasing out all metolachlor uses. The Sohn
11 Declaration asserts the loss of the entire timber production in buffers that are not treated with
12 specified pesticides this year, even though one of the pesticides, triclopyr, is available in a less
13 toxic formulation and the pesticides need to be applied only one time in a 50-year rotation.
14 Some of the declarants complain that they will be unable to use either phosmet or azinphos
15 methyl to control aphids on apples, while others located where phosmet may still be used assert
16 that there are no alternatives to azinphos methyl, even though other growers consider both viable
17 for aphid control. Compare Miller & Bryson Decl. (use phosmet on apples and can continue to
18 use it based on not likely to adversely affect determination) with Auvil, Peterson, Petersen,
19 Sandidge & Estes Decls. (do not claim phosmet use but phosmet is available due to effects
20 determinations in range of Middle Columbia steelhead, Upper Columbia steelhead, and Upper
21 Columbia chinook); Farm Bureau Ex. 3 (identifying phosmet as an alternative to azinphos
22 methyl). The Knutzen and Nelson Declarations (§ 7) list 20 pesticides that they "may use, as
23 necessary" on their potato crops, yet seven of those pesticides are available in their location and
24

1 another one has only a one-yard buffer for ground injections. See supra at 37. Accordingly,
2 some of their chosen pesticides remain viable alternatives for those covered by the injunction.

3 Even apart from the conclusory assertions that alternatives are more costly, almost all of
4 the declarants claim losses for their entire crop in the buffer zones rather than any increased costs
5 of alternative pest control. For example, the Vincent Decl. ¶ 4 asserts a loss of an entire
6 cranberry crop. The declaration indicates that chlorothalonil was unavailable for use on
7 cranberries for years, yet provides no data showing input costs, crop production, and losses from
8 cranberry production prior to the availability of chlorothalonil.¹⁶

9 A couple of the declarations calculate losses based on a larger 500-foot aerial buffer,
10 which they say applicators are imposing. Berdan Decl. ¶¶ 6, 11; Bryson Decl. ¶¶ 6, 11. Because
11 these statements are not based on the first-hand knowledge of the declarant, they are
12 inadmissible as hearsay. In any event, because any such 500-foot buffer is not required by this
13 Court's injunction, it cannot be the basis for estimating the injunction's economic impact.

14 The declarations revert to raw speculation and hearsay when they stray from the
15 declarants' own farming practices to predictions of harm to the county or other unnamed
16 farmers. Some assert that everyone in the county will be affected. Joan Estes Decl. ¶¶ 9, 11
17 ("without using chemicals, it is not possible to make a profit;" "it would affect everyone who has
18 land in production along the Columbia River"); Cindy Estes Decl. ¶¶ 10, 12 (same); Sandidge
19 Decl. ¶ 13. Others contend that farmers risk losing water rights that go unused due to the Order
20 despite an exemption that would likely cover such a situation. Berdan Decl. ¶ 9; see Farm
21 Bureau Motion at 31 n.19 (noting sufficient cause defense to loss of water rights due to non-use).

22
23 ¹⁶ As noted above at 35, chlorothalonil remains available in this area under the injunction, so this
24 declaration would lack an adequate foundation even if it had described the increased costs of
using alternatives.

1 Still others try to link the Court’s injunction to a decline in watershed restoration and salmon
2 enhancement projects, to conversion of farmlands to subdivisions, or to a decline in property
3 taxes with adverse impacts on community services. E.g., Bryson Decl. ¶ 13 (“believe the county
4 will suffer irreparable harm including the loss of jobs and tax dollars”); Berdan Decl. ¶ 13
5 (same); Hanson Decl. ¶ 12 (same); Petersen Decl. ¶ 11 (same); Jacobs Decl. ¶ 11 (asserting many
6 will be forced to sell their farms to developers). These assertions border on fantasy and are
7 inadmissible under the Rules of Evidence.

8 In sum, even if the introduction of new evidence is allowed at this stage in the litigation,
9 most of the new declarations and exhibits fail to meet controlling evidentiary standards and
10 should be stricken, in whole or in part.

11 C. CropLife’s Assertion of Reputational Harm Lacks Factual or Legal Support.

12 CropLife makes unsupported assertions that its members will suffer reputational harm
13 from the urban point-of-sale warnings. CropLife Motion at 22. In contending it will suffer
14 reputational harm, CropLife relies (at 22) on cases where the businesses proved misconduct in
15 the form of unfair competition or some other wrongful conduct. In Rent-a-Center, Inc. v.
16 Canyon Television and Appliance, Inc., 944 F.2d 597, 603 (9th Cir. 1991), the Ninth Circuit
17 affirmed a preliminary injunction based on a violation of a covenant not to compete, and in
18 Regents of the Univ. of Cal. v. Am. Broadcasting Co., 747 F.2d 511, 520 (9th Cir. 1984), it
19 affirmed a preliminary injunction based on an antitrust violation. See also Florida Businessmen
20 v. City of Hollywood, 648 F.2d 956 (5th Cir. 1981) (finding likelihood of success in challenging
21 constitutionality of ordinance). In contrast, CropLife has not shown the point-of-sale
22 notifications are illegal, nor has it contended they are inaccurate. At least one court has rejected
23 a claim of reputational harm where the required “labeling would be accurate, although
24 potentially neither desirable nor required by law.” National Juice Products Ass’n v. United

1 States, 628 F. Supp. 978, 985 n.8 (C.I.T. 1986) (superseded by statute on other grounds).

2 CropLife's assertion of reputational harm fails not only for want of a legal basis but also
3 for lack of proof. CropLife has offered absolutely no evidence of reputational harm. In the
4 absence of such evidence, CropLife's claim cannot prevail. See, e.g., Oakland Tribune, Inc. v.
5 Chronicle Pub. Co., 762 F.2d 1374, 1377 (9th Cir. 1985) (failure to prove reputational harm
6 where affidavits "provided only conclusory statements" or originated from an interested party);
7 Goldie's Bookstore, Inc. v. Superior Court of State of California, 739 F.2d 466, 472 (9th Cir.
8 1984) (reversing district court's finding of reputational harm due to lack of factual basis).

9 V. THE COURT ACTED WELL WITHIN ITS EQUITABLE POWER.

10 A. This Court Appropriately Crafted an Injunction in Light of the Substantial
11 Procedural Violation of Section 7 and Evidence of Harm to Salmon From the
Pesticides.

12 As discussed above, this Court has equitable discretion to craft appropriate injunctive
13 relief to protect listed salmonids from the pesticides at issue during the consultation process. The
14 Court found EPA in violation of ESA Section 7 with respect to these pesticides based on EPA's
15 failure to initiate consultations despite substantial scientific evidence that the pesticides harm
16 salmon, their habitat, or their food sources. July 2, 2002 Order. Consistent with Ninth Circuit
17 precedent, the Court concluded that injunctive relief is "necessary to fulfill the institutionalized
18 caution mandate of the ESA" in the face of "EPA's substantial procedural violation of section
19 7(a)(2)." Aug. 8, 2003 Order at 11.

20 CropLife and the Farm Bureau charge that the Court acted based on speculation and
21 surmise. To the contrary, the Court acted on the basis of EPA's findings of harm in its risk
22 assessments on the pesticides, USGS detections of the pesticides in salmon streams at levels
23 associated with detrimental effects to aquatic life, or a combination of the two. EPA had
24 previously equated its risk assessment findings with the "may affect" determinations that warrant

1 Section 7 consultation. 54 Fed. Reg. 27,984, 28,004 (1989). Inexplicably, EPA had taken no
2 steps to initiate Section 7 consultations when it made these findings. It simply postponed its
3 ESA compliance indefinitely. Similarly, EPA took no action when USGS detected 14 of the
4 pesticides in salmon waters at or above established aquatic life hazard thresholds.

5 The Farm Bureau's critiques of EPA's risk assessments and of the USGS studies are
6 reminiscent of the oppositions mounted by EPA and CropLife (on behalf of the Farm Bureau and
7 Potato Commission, among others) to the motion for further injunctive relief. At that stage of
8 the litigation, CropLife introduced its own risk assessment for one pesticide and refuted EPA's
9 risk assessment findings for others through declarations from pesticide registrants. EPA and
10 CropLife sought to minimize the importance of USGS detections of pesticides in salmon
11 watersheds, even at levels exceeding aquatic life criteria, and insisted on fish kills to substantiate
12 harm from the pesticides.

13 Like CropLife's earlier opposition, the Farm Bureau tosses out scattershot objections to
14 the EPA's risk assessment process and to drawing inferences from the USGS detections.¹⁷ This
15 is neither the appropriate time nor place to address those objections. As this Court recognized in
16 its July 16, 2003 Order at 3-4, and its August 8, 2003 Order at 5, 8-9, 11, 19-20, it is not the role

17 ¹⁷ This Court previously concluded that: "CropLife's arguments that specific pesticide uses
18 would not harm salmonids are belied by EPA's risk assessments and NMFS and FWS critiques
19 of those assessments." Aug. 8, 2003 Order at 13-14. While EPA rarely conducts investigations
20 to make a causal link between a particular pesticide and a fish kill, it has used reported fish kills
21 to corroborate aquatic risks. 3rd Code Decl. Ex. 5 at 46, 51-52 (reported fish kills for azinphos-
22 methyl substantiate risk estimates); 1st Code Ex. 33 at 48-49 (same for ethoprop). Moreover,
23 EPA does not require comprehensive monitoring to determine whether authorized pesticide uses
24 are contaminating surface water; the USGS monitoring, although only a snapshot in time,
25 represents the best monitoring data available. Ewing Decl. ¶¶ 21, 25, 26, 28. The Farm Bureau
26 asserts at 43, without citing subsequent monitoring, that usage patterns have changed since the
USGS studies in ways that may lessen surface water contamination. The Section 7 consultation
is the appropriate place to address the relevance and import of any such changes.

1 of the Court to conduct the jeopardy analysis and craft long-term mitigation measures; the ESA
2 has assigned that task to NMFS through the consultation process.¹⁸

3 B. The Obligations Imposed on Intervenor Defendants Were Minimal and Drawn From the
4 Form of Injunction Proposed by EPA and the Intervenor Defendants.

5 CropLife objects to the injunction's requirement that the intervenors distribute the point
6 of sale notifications because the ESA authorizes courts to enjoin any person in violation of the
7 Act and the intervenors have not been found to be in violation of the ESA. CropLife did,
8 however, intervene as a defendant in this case. In doing so, it voluntarily subjected itself to the
9 power of the Court.

10 Moreover, the mechanism for distributing the point of sale notifications originated in the
11 proposed order on interim relief submitted jointly by CropLife and EPA. [Proposed] Order on
12 Interim Relief (Oct. 2, 2003) (Docket No. 207); Intervenor-Defendants' Statement Joining in and
13 Supplementing Federal Defendants' Proposed Form of Injunction at 4 (Oct. 2, 2003) (Docket
14 No. 197) ("Intervenor Defendants believe that the relief specific to urban use pesticides in part V of the
15 EPA proposal provides a fair, effective, and workable alternative"). While their proposed
16 content for the point of sale notifications differed from what the Court ultimately required, the
17 intervenors' role in the distribution process remained essentially the same. The CropLife-EPA
18 proposed order provided (at 7) that:

19 For the concise paper based educational information, the Intervenor defendants
20 will produce this concise educational information in paper form, from electronic
21 media provided by EPA. The Intervenor defendants will distribute it in quantity,
22 for point of sale distribution, to major retail sales outlets where lawn and garden
23 products are sold in Urban Areas in Washington, Oregon and California, within
24 90 days of the effective date of this Order.

25 ¹⁸ The Farm Bureau asserts (at 45) that the salmon cannot possibly be in danger from these
26 pesticides because many have been in use for 30-50 years. While many of the Farm Bureau's
assertions may be addressed in the consultation process, this type of hyperbole has no scientific
underpinning and thus has no place in a Section 7 consultation.

1 Not only does CropLife appear to have waived any right to object to this distribution role,
2 but its objections to this aspect of the Order have become moot. Under the Order, intervenors
3 were to distribute the point of sale notifications by April 5, 2004. In its March 22, 2004 status
4 report, CropLife indicated that it would be mailing the point of sale notifications to home and
5 garden sales outlets on April 2, 2004, and in its recently filed response to plaintiffs' request for a
6 status conference, CropLife reported that it had completed the distribution. Accordingly,
7 CropLife's challenge to its distribution obligations under the Order has become moot.
8

9 C. The January 22, 2004 Order Describes the Prohibited Acts in Reasonable Detail
10 and Comports With Fed. R. Civ. P. 65(d).

11 The Farm Bureau contends that the injunction violates Fed. R. Civ. P. 65(d) because it
12 lacks sufficient clarity and precision and because it refers to outside sources to identify "salmon
13 supporting waters." The January 22, 2004 is sufficiently detailed to pass muster under Fed. R.
14 Civ. P. 65(d).

15 First, the Farm Bureau protests that the practical effect of the injunction is to restrict the
16 activities of individuals who are not parties to the litigation. However, this scenario is not
17 uncommon. If a lawsuit invalidates EPA's water discharge permit, a private party discharging
18 pollutants pursuant to that permit would obviously be affected. Similarly, a court order
19 invalidating a pesticide registration, in whole or in part, impacts private parties' ability to use the
20 pesticide in ways proscribed by the court order. Nothing is untoward in this type of spillover
21 impact from a court order invalidating a federal authorization.

22 Second, the Farm Bureau complains that the injunction may bind landowners who have
23 not been put on notice of the acts prohibited by the order. The language of Fed. R. Civ. P. 65(d)
24 quoted by the Farm Bureau (at 5 N.2) provides the safeguards that the Farm Bureau seeks. An
25 injunction may bind only "those persons in active concert or participation with them who receive

1 actual notice of the order.” Fed. R. Civ. P. 65(d).

2 Third, the Farm Bureau objects to the terms of the Order, calling them “unreasonably
3 vague.” Farm Bureau Motion at 5. In describing its objection, the Farm Bureau mounts no
4 attack on the description of the buffers or the point-of-sale notification requirement, effectively
5 conceding that the prohibitions are clear. Instead, the Farm Bureau focuses on the steps a
6 landowner must take to ascertain whether a pesticide is subject to the injunction in a particular
7 geographic area.

8 With respect to the covered pesticides, the Order delineates the pesticides subject to its
9 mandates. These exemptions are depicted in two charts attached as exhibits to the Order. The
10 Farm Bureau seems to object to the need to check both charts, rather than to the clarity of the
11 information presented in the charts. It also seems to object to the need to check for multiple
12 salmon listings in those areas that fall within the range of more than one listed salmonid. These
13 objections are presented in the Farm Bureau’s motion without any supporting evidence that
14 landowners have been unable to identify the pesticides that they use or the listings that coincide
15 with their geography.

16 The Farm Bureau devotes most of its space to the Order’s delineation of salmon
17 supporting waters. The Order defines “salmon supporting waters” as “the area below the
18 ordinary high water mark of all streams, lakes, estuaries, and other water bodies where salmon
19 are ordinarily found at some time of the year.” Order at 4. The Order further describes the range
20 of the salmon listings through references to critical habitat designations or specific geographical
21 areas to describe the salmon ranges. The Farm Bureau does not contend that this definition is
22 unduly vague. For example, its sole complaint regarding the reference to “ordinary high water
23 mark” is not that it is unclear, but that it may make a significant difference in the amount of area
24

1 covered in some instances. Farm Bureau Motion at 12.¹⁹

2 The Farm Bureau has offered no alternative way to describe the range of the listed
3 salmon or to identify salmon-supporting waters. Its objections appear to stem from the realities
4 of salmon biology, rather than any lack of clarity in the Order. Ironically, most of the Farm
5 Bureau's objections focus on the Court's desire to make it easier for the public to identify
6 salmon-supporting waters through the use of government databases. The Farm Bureau has
7 lodged no objection to the database applicable to California or to the use of the streamnet
8 database in Oregon; it limits its complaints to the use of streamnet in Washington State.

9 It cites two declarations for the proposition that farmers have been unable to comprehend
10 the streamnet database. Motion at 11. Neither declaration explains the steps taken to ascertain
11 which waters are covered by the Order. The Knutzen Declaration states only that "[t]he use of
12 www.streamnet.org to identify streams is not a simple process. I am concerned that I have not
13 identified all streams affected by the Court's order." Knutzen Decl. ¶ 15. However, the
14 declaration identified no waterbodies adjacent to the Knutzen farm, making it impossible to
15 assess whether streamnet, in fact, includes relevant waterbodies. The Nelson Declaration is even
16 more sparse. It identifies no waterbodies adjacent to the farm, makes no reference to streamnet,
17 and says no more than "[i]t is very confusing and frustrating trying to understand which rivers

18
19 ¹⁹ The Farm Bureau objects (at 6-7) to the Order's reference to the critical habitat formally
20 designated by NMFS for listed salmonids, not because of any lack of clarity in those
21 designations, but because many of the critical habitat designations have been vacated and
22 remanded to NMFS for further economic analysis. Nothing in the consent decree leading to the
23 vacatur nor in the Farm Bureau's objection challenges the accuracy of the critical habitat
24 designations in identifying the range of listed salmon. Indeed, the Farm Bureau, along with the
other intervenors (then represented by the attorneys who brought the challenge to the critical
habitat designations leading to the consent decree), joined in EPA's proposed Order, which
endorsed using the vacated critical habitat designations to identify the range of listed salmon and
indicated that the designations are instructive in this respect. Fed. Defs.' Proposed Order at 3 n.5
(Oct. 2, 2003).

1 and streams require a buffer.” Nelson Decl. ¶ 16. Other aids have been or are being developed
2 to assist individuals in ascertaining whether their pesticide uses are subject to the buffers, but
3 neither declarant evidently used these tools. For example, the Washington Department of
4 Agriculture has developed maps of counties that list covered waterbodies.
5 <http://agr.wa.gov/PestFert/EnvResources/Buffers.htm>. The Oregon Department of Agriculture
6 has developed similar finding aids. <http://oda.state.or.us/pesticide/lawsregs/buffermaps.html>.²⁰

7 The Farm Bureau also objects to streamnet because another database has more up-to-date
8 information at a finer scale. Motion at 11. For this reason, the streamnet website advises
9 individuals to contact the Washington Department of Fish and Wildlife (“WDFW”) to obtain
10 more up-to-date and accurate information. *Id.* Richard O’Connor, a WDFW official who
11 oversees Washington fish data systems, has prepared a declaration comparing streamnet and
12 another finer-scale database called salmonscape: <http://wdfw.wa.gov/mapping/salmonscape/>. He
13 believes salmonscape would provide a more accurate and up-to-date view of which streams
14 contain various salmonids and that it would be more user-friendly as well. If the Court is
15 persuaded that salmonscape would be easier to use and more precise than streamnet, the
16 appropriate remedy would be to modify the Order to refer to salmonscape in Washington rather
17 than streamnet.

18 Apart from the injunction’s workability, the Farm Bureau lodges a blanket objection to
19

20 ²⁰ While the Farm Bureau complains that it is difficult to identify “salmon supporting waters,” as
21 currently defined, it urges the Court to modify the injunction to apply only when salmon are
22 present, which it contends would be workable through dissemination of information on EPA’s
23 website, local agriculture extension offices, and the intervenor organizations. Motion at 48.
24 Such an ever-changeable definition would be far more subjective and difficult to apply than the
current definition, which is based on data collected by fish and wildlife agencies and compiled in
searchable databases. The Farm Bureau’s eagerness to endorse a modification of the injunction
that would be more cumbersome and imprecise to implement undermines its objections to the
current Order.

1 the Order's reference to an outside source, most particularly streamnet. This objection is drawn
2 from Fed. R. Civ. P. 65(d), which requires that an injunction "shall describe in reasonable detail,
3 and not by reference to the complaint or other document, the act or acts to be restrained." The
4 Ninth Circuit "has not taken a rigid approach to Rule 65(d)," but has focused on whether the
5 injunction gives "adequate notice to parties faced with the possibility of contempt" and has
6 upheld injunctions if references to outside documents are specific and the underlying documents
7 are unambiguous. Davis v. City & County of San Francisco, 890 F.2d 1438, 1450 (9th Cir.
8 1989). In United States v. Olander, 584 F.2d 876, 880-81 (9th Cir. 1978), vacated on other
9 grounds, 443 U.S. 914 (1979), the Ninth Circuit upheld an injunction that required fishermen to
10 call a specific hotline to determine which areas had been closed to fishing, rejecting a Rule 65(d)
11 challenge because the order was "as specific as the nature of the subject matter regulation of
12 fishing in Puget Sound permits." Id. at 881. As with the injunction in Olander, this Court's
13 January 22, 2004 is "as specific as the subject matter" permits. The Order clearly extends to
14 waters that support salmon at some time of the year. It is salmon biology, not any defect in the
15 Court's Order, that extends the covered waters through the stream arteries that serve as the
16 salmon lifelines. The reference to streamnet is designed to assist landowners in identifying
17 salmon-supporting waters subject to the Order by pointing them to a government database
18 denoting fish presence in waterbodies. Such a reference adding clarity and direction comports
19 with Fed. R. Civ. P. 65(d).

20 To the extent that the Farm Bureau objects to the Order's terminating events because they
21 involve actions outside the scope of the Order, this scenario is dictated by the fact that such
22 events occur after the Order is entered. The question is whether the Order clearly describes the
23 terminating events. By providing for termination of the buffers for particular salmon listings if
24

1 EPA makes a no effect or not likely to adversely affect determination for that pesticide and area
2 or if NMFS completes consultation, the Order describes the actions that will lead to termination
3 of the injunction precisely and in sufficient detail.

4 VI. THE FARM BUREAU'S REQUEST FOR MODIFICATION OF THE INJUNCTION

5 In addition to its objections to various aspects of the injunction, the Farm Bureau makes
6 several explicit requests for modification. None of these specific modification requests has
7 merit.

8 First, the Farm Bureau asks the Court to suspend the injunction pending EPA's
9 completion of a user-friendly interactive mapping system. As demonstrated above, while the
10 Farm Bureau has made numerous claims regarding the difficulties in applying the Court's
11 January 22, 2004 Order, it has failed to substantiate these claims. Moreover, it has neither
12 acknowledged nor addressed the utility of the maps, tables, and other aids that have been
13 developed by the Washington and Oregon Departments of Agriculture. Because the Farm
14 Bureau has failed to demonstrate its charges of vagueness and confusion, there is no reason to
15 suspend the buffer requirements in the Order pending the completion in the unspecified future of
16 another set of maps. Indeed, such a suspension would collide with the ESA's precautionary
17 mandates.

18 Second, the Farm Bureau asks the Court to direct EPA to prioritize its effects
19 determinations based on how critical the pesticide is to growers in Washington State.
20 Prioritizing the effects determinations and consultations based on risk to salmon would be more
21 consistent with the ESA than one based on the pesticide's importance to a segment of the user
22 community. For this reason and because the Court lacks an evidentiary basis to make findings to
23 support an economic-based prioritization, the Coalition opposes this request for modification.

24 Third, the Farm Bureau asks the Court to exclude all herbicides from the injunction. This

1 request is based on the late-filed Declaration of Allan Felsot, which should be stricken, see supra
2 at 31-32, and on the supposition that herbicides are less toxic to aquatic species than other
3 pesticides. However, as the Declaration of Dr. Richard Ewing, filed in support of the Coalition's
4 motion for summary judgment, attests, herbicides often kill the aquatic plants that provide
5 essential cover, shade, and other aspects of aquatic habitat for salmonids. Based on these
6 impacts, EPA has made risk assessment findings of harm to fish habitat for herbicides and USGS
7 has detected herbicides at or above levels set to protect aquatic life. Accordingly, there is no
8 basis for a categorical herbicide exemption.

9 Fourth, the Farm Bureau seeks to limit the buffer requirement to times when salmon are
10 actually present in salmon waters. This request is reminiscent of the Farm Bureau's position as
11 part of the CropLife coalition in the proceedings leading up to the injunction. Such a time-
12 limited application of the buffers would be ill-advised because pesticides often have impacts that
13 last beyond their immediate contact with the aquatic environment. For example, many pesticides
14 persist in the aquatic environment long after their initial contact. Moreover, an herbicide that
15 destroys aquatic plants or riparian vegetation may alter the aquatic environment for months or
16 longer after contact. In addition, some salmon species, such as coho salmon, are always present
17 in freshwater systems at some part of their life cycle, since the juveniles spend their first full
18 winter in freshwater.

19 Limiting the buffer requirement to times when salmon are present would also be
20 unworkable because there would be no objective way to identify whether and when listed salmon
21 are present. The state fish and wildlife agencies identify salmon-bearing streams based on
22 observations of fish presence in sporadic surveys, but no governmental or scientific body
23 conducts ongoing monitoring to ascertain which salmon occupy which streams at any given
24

1 point in time.

2 Finally, the Farm Bureau asks the Court to exempt from the Order any pesticide uses that
3 may become subject to a Section 7(d) determination issued by EPA at some time in the future.

4 The Farm Bureau has demonstrated no need to craft an exemption for the only Section 7(d)
5 determinations issued by EPA to date. The Court has already exempted pesticide uses that have
6 received an EPA “not likely to adversely affect” determination, which are the only pesticide uses
7 subject to EPA’s Section 7(d) determination. The Farm Bureau’s plea for an open-ended
8 exemption for unforeseen, future Section 7(d) determinations of unknown scope is unwarranted.

9 CONCLUSION

10 For the foregoing reasons, the motions for a stay and for modification of the injunction
11 should be denied.

12 Respectfully submitted this 21st day of April, 2004.

13
14 /s/ Patti Goldman

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On April 21, 2004, I served a true and correct copy of:

1. Plaintiffs' Combined Opposition to CropLife's Motion for a Stay Pending Appeal and Washington State Farm Bureau and Washington State Potato Commission's Motion to Stay and Modify the January 22, 2004 Order Awarding Injunctive Relief Pending Appeal.

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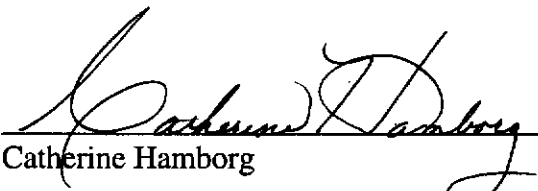
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17 I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and
18 correct. Executed this 21st day of April, 2004, at Seattle, Washington.

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26

Catherine Hamborg